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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68

REPLY COMMENTS OF THE VIRGIN ISLANDS TELEPHONE COMPANY

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April 27, 1999

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SUMMARY

The Virgin Islands Telephone Company ("Vitelco") respectfully submits that the comments filed in this proceeding strongly suggest that the FCC should: 1) preclude state commissions from arbitrating inter-carrier compensation for Internet traffic because such traffic is jurisdictionally interstate; 2) adopt a federal, cost-based inter-carrier compensation mechanism that permits all carriers to recover costs incurred in carrying ISP-bound traffic; and 3) construe the Communications Act's "Most Favored Nation" provision so as to preserve the negotiation and arbitration regime of Sections 251 and 252.

As Vitelco and other commenters demonstrated, states lack the requisite jurisdiction to regulate inter-carrier compensation for ISP-bound traffic. In the Communications Act, Congress explicitly established a dual jurisdictional system for wire and radio communications, granting the FCC jurisdiction over interstate matters and the states jurisdiction over intrastate matters. ISP-bound traffic is jurisdictionally interstate, hence, the FCC is the only body with authority to establish the rates applicable to this traffic. Nothing in Sections 251, 252 or elsewhere alters this fact. Thus, the FCC must not permit the states to continue arbitrating compensation issues for ISP-bound traffic.

Having established the Agency's exclusive jurisdiction over Internet traffic, Vitelco and numerous other commenters urge the Commission to adopt a federal, cost-based inter-carrier compensation mechanism. Such a mechanism is necessary because usage-based reciprocal compensation rates presume voice traffic and relatively short hold times. Where those assumptions are violated, as in the case of ISP-bound traffic where hold times are extremely long, payments quickly exceed actual costs and produce CLEC windfalls. Further, because of the ESP exemption, ILECs cannot recover their costs from ISPs. The Commission must either

eliminate these ILEC to CLEC payments by adopting a meet-point billing regime, or provide a revenue source from which ILECs may fund such payments.

Finally, there is a broad consensus among the commenters that the Commission should adopt a narrow construction of Section 252(i)—the Act's "Most Favored Nation" provision. Under the favored construction, a carrier adopting a provision of a interconnection agreement under Section 251(i) may do so only for the term of the original agreement.

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REPLY COMMENTS OF THE VIRGIN ISLANDS TELEPHONE COMPANY

The Virgin Islands Telephone Company ("Vitelco") respectfully submits its response to the comments filed in the above-referenced docket. As demonstrated more fully below, there is significant support in the record that: 1) state commissions have no jurisdiction to establish inter-carrier compensation for ISP-bound traffic, which is jurisdictionally interstate; and 2) any compensation mechanism established must permit all carriers to recover costs incurred in carrying ISP-bound traffic. Accordingly, Vitelco urges the FCC to adopt a federal, cost-based mechanism for ISP-bound traffic that is equitable for all carriers involved.

I. INTRODUCTION

The Commission, in the Declaratory Ruling,[1] determined that ISP-bound traffic is jurisdictionally interstate. Thus, the only remaining issues to be addressed in this proceeding are

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 99-68 (Feb. 26, 1999) ("*Declaratory Ruling*").

which body—the FCC or states—has the authority to establish the rates applicable to this interstate traffic and what compensation mechanism is most appropriate.

Many commenters demonstrated that Congress, via the Communications Act, delegated the task of establishing interstate rates *only* to the FCC, and that the FCC cannot delegate this authority to the states. Further, many commenters proved that the interstate matters subject to state arbitration pursuant to Section 251 (b) and (c) do not include inter-carrier compensation for ISP-bound traffic. Therefore, the FCC, as a threshold matter, must preclude state commissions from continuing to arbitrate this jurisdictionally interstate matter.

Further, the FCC should adopt a federal, cost-based compensation mechanism for ISP-bound traffic that recognizes that ILECs and CLECs incur legitimate costs in transporting such traffic and permits all carriers involved to recover their costs. In addition, the Commission should clarify that Section 252(i) of the Act allows carriers to "opt-in" to a provision only for the term of the original agreement.

II. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO DEFER INTER-CARRIER COMPENSATION ISSUES FOR ISP-BOUND TRAFFIC TO THE STATES

A. There Is Significant Support In The Record That The Jurisdictional Limitations Imposed By Congress Preclude The FCC From Delegating Compensation Issues For ISP-Bound Traffic To The States

Most commenters did not address the FCC's statutory authority to defer inter-carrier compensation issues for ISP-bound traffic to state commissions. However, of those parties addressing this issue, a significant number agree with Vitelco that the dual system of governance established by Congress precludes the Commission from "handing-off" its responsibility to regulate inter-carrier compensation for ISP-bound traffic to the states.[2]

Commenters advocating state arbitration of inter-carrier compensation for ISP-bound traffic effectively ignored the jurisdictional divide between federal and state regulation. Indeed, one commenter, Focal Communications, went so far as to state that "the jurisdictional nature of ISP-traffic should be irrelevant to intercarrier compensation for this traffic."[3] Of course, such a statement is nonsensical because jurisdiction is a threshold matter that must be addressed prior to the adoption of any regulations for communications services.

The bottom-line is that Congress granted the FCC exclusive jurisdiction over interstate matters and "the Commission cannot circumvent this statutory boundary by delegating or disclaiming its interstate regulatory obligations to the States."[4] ISP-bound traffic is *jurisdictionally* interstate—a conclusion well supported by FCC precedent[5] and comments filed in this proceeding.[6] The FCC is the only body with statutory authority to regulate rates for such

[2] *See* GTE at 15 ("the Commission has a statutory obligation to regulate 'interstate and foreign commerce in communications."); Frontier at 8 ("the United States Constitution confirm[s] that the federal and state governments were established as dual sovereigns, each . . . sovereign in their respective spheres."); BellSouth at 5 ("the Commission [cannot] vest the state commissions with the power to regulate matters relating to interstate communications that, under the Act, are specifically reserved to the Commission.").

[3] Focal Communications at 14.

[4] GTE at 15.

[5] *See Declaratory Ruling* ¶ 20; *GTE Telephone Operating Cos.*, 14 CR 279, ¶ 27 (Oct. 30, 1998); *MTS and WATS Market Structure*, 4 FCC Rcd 5660, 5660 (1989).

[6] *See* NCTA at 9; Keep America Connected at 9; BellSouth at 9; MPSC at 1; NTCA 6, 8-9; SBC at 5, 24; TANE at 5-6.

traffic and "there is nothing in the Communications Act that vests this Commission with the authority to grant jurisdiction over interstate communications to the states."[7]

B. The Record Provides No Statutory Support For The Commission's Tentative Conclusion That States Can Continue To Arbitrate Inter-Carrier Compensation For ISP-Bound Traffic Pursuant To Sections 251/ 252.

The Commission tentatively concluded in the Declaratory Ruling that "state commissions may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[8] Many parties agreed with Vitelco that the Section 251/252 state arbitration process is limited to intrastate issues and interstate issues expressly detailed in Section 251(b) and (c) of the Act and, therefore, does not cover inter-carrier compensation for ISP-bound traffic.[9]

CTSI and Focal Communications took the opposite view, asserting that because parties can voluntarily negotiate inter-carrier compensation for ISP-bound traffic under Section 252(a), state commissions can arbitrate this issue under Section 252(b).[10] CTSI and Focal leapt from point A—parties' right to negotiate compensation issues for ISP-bound traffic—to point C—the

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[7] Sprint at 7.

[8] *Id.* ¶ 25.

[9] Ameritech at 19 ("nothing in [Section 252(c)] or any other provision of the Act confers upon the states the right to use a section 252 arbitration to impose inter-carrier compensation on interstate access traffic."); SBC at 6 ("neither Section 251 nor Section 252 was intended to apply to the governance of compensation for any inter-carrier traffic other than that which both originates and terminates intrastate."); BellSouth at 5 ("a state commission's arbitration authority under Section 252 extends only to agreements negotiated pursuant to the requirements of Section 251."); ICG at 5 ("the states have no statutorily prescribed role in regulating interstate rates that fall outside Sections 251 and 252."); GTE at 4 ("under Section 252 of the Act, the states are empowered to arbitrate only matters within the scope of Section 251.").

[10] CTSI at 9-10; Focal Communications at 2.

states' right to arbitrate compensation issues for ISP-bound traffic—with absolutely no discussion as to how the states obtained *jurisdiction* to arbitrate this interstate matter. Although Section 252(a) permits parties to voluntarily negotiate issues outside the scope of Section 251(b) and (c), it does not confer jurisdiction to the states to arbitrate *any* interstate issues raised by one of the parties during the negotiations. Rather, the states' jurisdiction over interstate matters is limited to those interstate matters specifically enumerated in Section 251(b) and (c).[11] Inter-carrier compensation for ISP-bound traffic is not governed by Section 251, thus, the FCC must not permit state commissions to continue arbitrating this interstate issue.

America Online argued that nothing in the Communications Act expressly *precludes* the states from arbitrating compensation issues for ISP-bound traffic.[12] Nothing could be further from the truth. Because Sections 151 and 201 of the Act clearly and unambiguously confer jurisdiction only upon the FCC to regulate interstate matters, states cannot arbitrate inter-carrier compensation for ISP-bound traffic.

Other commenters attempted to elude the jurisdictional question by recommending that the FCC allow states to continue arbitrating compensation issues for ISP-bound traffic in accordance with broad "national rules" established by the FCC.[13] This is the current "system" used by state commissions in arbitrating interstate matters. The states, however, can only use this "system" to arbitrate those interstate matters specifically identified in Section 251. Congress did not include inter-carrier compensation for ISP-bound traffic within the list of interstate

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[11] *See* Vitelco at 9-10.

[12] America Online at 6.

[13] *See* ALTS at 10; AT&T at 4-6; Choice One at 1; CompTel at 10.

matters subject to Section 251/252 arbitration, therefore, the states cannot exert jurisdiction over this issue.

Several parties—AT&T, CTSI, Focal Communications and ALTS—argued that the states should be permitted to arbitrate inter-carrier compensation issues under the Section 251/252 regime because disposition by the states would be "more efficient,"[14] save scarce Commission resources,[15] and "help facilitate the [Commission's] policy goals."[16] Even if these assertions were true, which they are not, the fact is the states lack the necessary authority to arbitrate inter-carrier compensation for ISP-bound traffic pursuant to Sections 251 and 252. The mere possibility that State arbitration of this issue might be "administratively easier" or "more efficient" is wholly insufficient to overcome the clear demarcation between federal and state jurisdiction.

Accordingly, Vitelco urges the Commission to step in and halt the states arbitration of inter-carrier compensation for ISP-bound traffic.

C. The FCC's Policy Requiring Reciprocal Compensation For CMRS Traffic Is Not Precedent For Subjecting ISP-Bound Traffic To Reciprocal Compensation.

America Online and Cablevision argue that the Commission's decision in the *Local Competition Order*[17] to impose reciprocal compensation on CMRS traffic serves as precedent for

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[14] ALTS at 7; *see* CTSI at 10.

[15] Focal Communications at 7-8.

[16] AT&T at 6.

[17] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499 (1996) (*"Local Competition Order"*).

subjecting ISP-bound traffic to reciprocal compensation.[18] While these commenters are correct that the Agency subjected CMRS traffic to reciprocal compensation, they have ignored the *type* of CMRS traffic subject to reciprocal compensation. Only traffic between an ILEC and CMRS provider that "originates and terminates within the same MTA [the *local* service area for CMRS traffic] is subject to transport and termination rates under Section 251(b)(5)."[19] All other CMRS traffic is subject to interstate access charges.[20] Vitelco and many other parties demonstrated that ISP-bound traffic is jurisdictionally interstate,[21] thus, reciprocal compensation is not mandated for this traffic under Section 251(b)(5)—a fact recognized by the FCC.[22] As such, the compensation requirements for *local* CMRS traffic are not applicable to ISP-bound traffic.

III. ANY FEDERAL COMPENSATION MECHANISM THE FCC ADOPTS SHOULD BE COST BASED, FOLLOWING THE MODEL OF THE MEET-POINT BILLING SYSTEM USED IN THE INTEREXCHANGE CONTEXT

As the foregoing jurisdictional analysis demonstrates, the FCC, not the states, must establish a mechanism to compensate LECs for the carriage of ISP-bound traffic. Vitelco explained in its Comments that any such mechanism should be cost-based. Other commenters largely agree and note that the current reciprocal compensation regime overcompensates CLECs for the carriage of ISP-bound traffic, to the detriment of ILECs.[23] The problem is reciprocal

[18] America Online at 9; Cablevision at 11.

[19] *Local Competition Order* at 16016.

[20] *Id.*

[21] Vitelco at 7; *See* NCTA at 9; Keep America Connected at 9; BellSouth at 9; MPSC at 1; NTCA 6, 8-9; SBC at 5, 24; TANE at 5-6.

[22] *Declaratory Ruling* ¶ 26.

[23] *See* Ameritech at 10; Bell Atlantic at 3-4; GTE at 6-10; Keep America Connected, *et. al*, at 9.

compensation payments are usage-based, and calculated based on the relatively short average hold times characteristic of voice traffic. Where longer hold times are involved, as is the case with ISP-bound traffic, reciprocal compensation payments quickly outstrip the payments ILECs receive from end-users for the use of a dial-in line.[24] At the point at which the revenue an ILEC receives for use of a line is exhausted, the carrier faces a dual hardship: ILEC uncompensated costs accrue *and* ILEC to CLEC subsidy payments continue to increase.[25] The impact is felt acutely by rural carriers,[26] such as Vitelco. As discussed below, a cost-based inter-carrier compensation regime would eliminate these distortions by compensating ILECs for the use of their facilities and eliminating ILEC to CLEC subsidies.

Commenters supporting the existing reciprocal compensation regime simply ignore the fact that ILEC to CLEC payments are one-way and substantially above costs by focusing on their bottom lines. CoreComm, for example, notes that uncertainty about reciprocal compensation payments will upset CLECs' business plans.[27] Global Naps even went so far as to say that ending reciprocal compensation would be unfair because the cost of terminating ISP-bound traffic would then be borne by the CLEC's *own customers*.[28] The proposition that costs be borne

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[24] *See* Ameritech at 10; Bell Atlantic at 3-4; Keep America Connected, *et al.*, at 9.

[25] *See* Ameritech at 10 (Noting that, because Ameritech does not recover its costs for originating Internet traffic, "any requirement that Ameritech compound its losses by paying inter-carrier compensation to LECs serving ISPs would be patently arbitrary, capricious, and unlawful.").

[26] *See* ICORE at 5-6 (Noting that, although rural LECs incur costs when delivering traffic to another exchange where an ISP is located (particularly where EAS facilities are used), they do not receive access revenues or any additional intrastate compensation.).

[27] CoreComm at 1.

[28] *See* Global Naps at 5.

by the cost-causer, however, is not only reasonable, it is also consistent with longstanding FCC policy.

The Wisconsin State Telecommunications Association acknowledged that reciprocal compensation payments exceed CLECs' costs to terminate Internet traffic, but nevertheless asked for a gradual phase-out to give CLECs and ISPs time to adjust to a subsidy-free world.[29] The problem here is that—consistent with the pro-competitive underpinnings of the 1996 Act—if CLEC business plans are based on unfair reciprocal compensation payments, those plans *should* be upset rather than frozen in place, even for an interim period. The 1996 Act does not create an entitlement for CLECs to collect subsidies from ILECs, and the Agency should not create such an entitlement in this proceeding.

Other commenters argued that Internet and voice traffic use the same network functions and should be lumped together for regulatory purposes, including compensation.[30] Embedded in such an argument is the incorrect assumption that usage-sensitive reciprocal compensation rates always accurately reflect the costs of network usage. In fact, as discussed above, such rates estimate the costs of network usage based on assumptions about the traffic carried, including the relatively short average hold-times characteristic of voice calls. Because those assumptions are invalid in the case of Internet traffic, compensation must be adjusted downward.

By calling for equivalent compensation for carriage of voice and Internet traffic, some commenters also seem to suggest that ILECs and CLECs offer comparable services, a suggestion contradicted by the CLECs' own business plans. As Bell Atlantic notes, because reciprocal

[29] *See* Wisconsin State Telecommunications Association at 2.

[30] America Online at 11-12; ALTS at 12-13; Focal at 15; GST at i, 3, 15.

compensation payments far exceed CLEC costs, CLECs have little incentive to directly serve heavy Internet users because they would lose the chance to earn windfall reciprocal compensation payments.[31] Indeed, if the return for carrying Internet and voice traffic were equivalent, one would expect CLECs to be indifferent to the make-up of their customer base, which would be composed of business and residential voice customers as well as ISPs. CLECs, however, recognize the opportunity to collect windfall reciprocal compensation payments in excess of their costs. Hence, the CLEC customer base contains a disproportionate number of ISPs and, further, many CLECs serve ISPs *exclusively*.[32]

The question of whether CLECs are over- or under-compensated for the carriage of ISP-bound traffic would be mooted, however, by a federal, cost-based inter-carrier compensation mechanism modeled on meet-point billing. Under meet-point billing for long distance service, where two or more carriers cooperate in the origination, transport and termination of interstate traffic, the carriers involved each recover their own charges based on the portion of their network used to complete the call.[33] Thus, costs are compensated based on the manner in which they are incurred, and no LEC is made responsible for covering the costs – alleged or actual – of another LEC. Vitelco and other commenters suggested that meet-point billing could serve as a model for an inter-carrier compensation regime, given that ISP-bound calls are interstate in nature.[34]

[31] Bell Atlantic at 3-4.

[32] *See* Bell Atlantic at 3 n.2; Frontier at 10-11.

[33] *See* Vitelco at 13-14.

[34] *See* Vitelco at 13-14; SBC at 22. GTE supports the concept. *See* GTE at 19. Of course, due to the ESP exemption, some ILEC and CLEC costs would remain uncompensated, but a meet-point system would eliminate ILEC to CLEC subsidies and more closely tie compensation to the manner in which costs are incurred.

Moreover, the costs need not remain uncompensated. As US West points out, CLECs could recover their costs for carrying Internet traffic from ISPs in the CLEC's local business rate.[35]

Alternatively, if the FCC adopts a federal, cost-based compensation regime that continues to require ILEC to CLEC payments, it should provide a mechanism, such as a revenue source, from which those payments may be funded.[36] The Wisconsin State Telecommunications Association endorses this approach in principle, noting that any inter-carrier compensation rules should work toward the elimination of implicit subsidies and conversion to a rational, cost-based system.[37] Other commenters address potential revenue sources for CLEC payments. SBC, for example, suggests that inter-carrier compensation payments to CLECs might be made from the federal universal service fund.[38] Regardless of their origin, however, it is clear that the CLEC payments may *not* come from ILECs due to the 1996 Act's prohibition on implicit subsidies in Section 254.[39]

IV. THE COMMISSION SHOULD CONSTRUE SECTION 252(i) – THE ACT'S "MOST FAVORED NATION" PROVISION – TO PRESERVE THE NEGOTIATION AND ARBITRATION REGIME OF SECTIONS 251 AND 252

Vitelco, and commenters across the spectrum of interests, urge the FCC to adopt a construction of Section 252(i) that will not permit requesting carriers to adopt, and thus reinstate,

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[35] US West at 8.

[36] Vitelco at 15.

[37] Wisconsin State Telecommunications Association at 2.

[38] SBC at 23.

[39] *See* Vitelco at 15.

the provisions of expired or soon-to-expire interconnection agreements.[40] Commenters representing ILECs, CLECs, IXCs and state commissions almost unanimously agree that a carrier adopting a provision of an interconnection agreement pursuant to Section 252(i) should do so only for the term of the agreement from which it is adopted.[41] The result is common sense and consistent with the expectations of the parties to interconnection agreements. No party who supports the opposite approach—which would allow CLECs to extend beyond their original terms favorable provisions, and even entire interconnection agreements—offers any explanation of how the Section 251/252 negotiation structure will be maintained where CLECs have no incentive to negotiate.[42]

V. **CONCLUSION**

For the foregoing reasons, Vitelco, joined by numerous commenters, urges the Commission to assert its jurisdiction under the Communications Act and establish a fair method of inter-carrier compensation for ISP-bound traffic. Specifically, Vitelco requests that the FCC preclude state commissions from arbitrating this interstate matter, and adopt a federal, cost-based compensation mechanism for ISP-bound traffic that would provide for full recovery of carriers costs incurred in carrying such traffic. To the extent the Agency establishes a mechanism that requires ILEC to CLEC payments, it must also establish a revenue source from which the payments will be funded. Lastly, Vitelco, along with most commenters, urges the Commission

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[40] Vitelco at 15-17.

[41] CompTel at 16; Florida at 8-9; Focal at 19; GST at 23-24; GTE at 24; KMC at 8; MCI at 22; SBC at 32; Texas at 9.

[42] *See, e.g.*, AirTouch at 5; PCIA at 9.

to clarify its rules implementing Section 252(i) to allow carriers to "opt in" to a provision only for the term of the original agreement.

Respectfully submitted,

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